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IN THE

Supreme Court of the United States

OCTOBER TERM, 1950

No. 122

NATIONAL LABOR RELATIONS BOARD,
Petitioner

versus

GULLETT GIN COMPANY, INC.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

BRIEF FOR GULLETT GIN COMPANY, INC., RESPONDENT

BALDWIN, HASPEL & MOLONY,
LAWRENCE A. MOLONY,
ROBERT R. RAINOLD,
CONRAD MEYER III.

HAUSER PRINTING CO., INC., NEW ORLEANS

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OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit, to which this writ of certiorari has been issued, is reported at 179 Fed. (2d) 499. The findings of fact, conclusions of law, and Order of the National Labor Relations Board (R. 30-66) are reported at 83 N. L. R. B. 1.

JURISDICTION

This matter is before the Court on writ of certiorari to the United States Court of Appeals for the Fifth Circuit. The jurisdiction of this Court rests on Section 10(e) of the National Labor Relations Act, as amended, and 28 U.S.C. 1254(1).

STATEMENT OF THE CASE

The Statement of the Case, as recited in the brief filed herein by the Board (pages 2-5 of the Board's brief), is a correct statement of the facts of the case. Respondent desires, however, to amplify that statement in the following particular.

Respondent calls to the attention of this Court the fact that the discharge of the employees involved in this case, although found by the Board and the Court of Appeals to be "discriminatory", as that term is used in the Act, was nevertheless a highly **technical** discriminatory discharge. The facts of the case, as shown in the Intermediate Report of the Trial Examiner, which were adopted by the Board in its Decision and Order, establish that the Respondent Company discharged the employees in a *bona fide* belief that it could not grant a wage increase to the employees at a time when a representation election was pending before the Board. In other words, the holding of the Board and the Court of Appeals that the Respondent Company discriminatorily discharged certain employees comes in a case in which the employer was sincerely, but erroneously, attempting to avoid an unfair labor practice.

The decision of the Court of Appeals demonstrates this in the following language from the opinion:

"Unlike the situation obtaining in the usual case of claimed discriminatory discharges, there is no claim here that these persons were discharged on account of their activity in favor of or against a particular union or labor organization which had organized, or was campaigning to organize, the plant."

* * * * *

"The record shows without conflict that the meeting was arranged for and held in the shop; that there was a discussion at the meeting; that **Wallace, for the respondent, patiently and carefully explained that he could do nothing, on account of the pending election for representation, about the demand**; and that instead of accepting this statement without demur, the employees persisted in trying to further discuss the question with him."

* * * * *

"The evidence makes it perfectly clear that there was no difference or dispute, between the employer and the discharged employees, as to what union or organization they had joined or should join, or should represent them. Nothing in the whole discussion remotely points to a difference between them arising out of, or traceable to questions of joining or not joining any particular labor organization. Certainly they were not discharged because they demanded or showed preference for one organization over the other or for the purpose of discouraging membership in any." (Emphasis added).

The above amplification of the Statement of the Case, as found in the brief filed herein by the Board, is offered to show the technical nature of the "discriminatory discharge", and particularly to emphasize

the fact that there was nothing in the conduct of the representatives of Respondent to warrant any attempt by the Board to award punitive or penal damages against Respondent.

QUESTION PRESENTED

The question presented on this writ of certiorari is whether the Gullett Gin Company, Inc., Respondent, in making whole certain employees for loss of earnings resulting from their discriminatory discharge, shall be entitled to deduct from their back pay such sums of money as the employees received from the Louisiana Unemployment Compensation Fund during the period of their discharge.

The United States Court of Appeals for the Fifth Circuit has decided the above question in favor of Respondent, and the National Labor Relations Board has petitioned this Court to review that decision of the Court of Appeals.

SUMMARY OF ARGUMENT

In this brief, Respondent will advance the arguments:

1. That the Board is without authority to punish or penalize an employer for a violation of the Act; that in cases involving discharged employees, the Board is limited to making the employees whole. *N. L. R. B. v. Fansteel Metallurgical Corp.*, 306 U.S. 240; *Consolidated Edison Co. v. N. L. R. B.*, 305 U.S. 197; *Republic Steel Corp. v. N. L. R. B.*, 311 U.S. 7; *Social Security Board v. Nierotko*, 327 U.S. 358.

II) That the rule regarding unemployment compensation benefits, adopted by the Board, makes a discharged employee more than whole, and is contrary to public policy.

III) That the rule adopted by the Board operates as an unjustified penalty on an employer. *Louisiana Unemployment Compensation Act*, La. Act 97 of 1936, as amended; Dart's, Louisiana Statutes, §§ 4434. 1 *et seq.* *Republic Steel Corp. v. N. L. R. B.*, *supra*; *Phelps Dodge Corp. v. N. L. R. B.*, 313 U.S. 177.

ARGUMENT

I.

IN FRAMING A BACK PAY AWARD, THE BOARD IS LIMITED TO MAKING AN EMPLOYEE WHOLE FOR HIS LOSS OF EARNINGS.

Section 10(c) of the National Labor Relations Act, as amended, provides in part that in those cases in which the employer has committed an unfair labor practice, the Board shall have authority to order an employer "to take such affirmative action including reinstatement of employees with or without back pay as will effectuate the policies of this Act." The policies of the Act, as found in Section 1, are (a) to encourage the practice and procedure of collective bargaining and (b) to protect the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing.

This Court has held in several decisions that the National Labor Relations Board does not have the au-

thority, under the guise of effectuating the policies of the Act, to punish or penalize an employer for the commission of an unfair labor practice. *N. L. R. B. vs. Fansteel Metallurgical Corp.*, 306 U.S. 240, 83 L. Ed. 627 (1939); *Consolidated Edison Co. vs. N. L. R. B.*, 305 U.S. 197, 83 L. Ed. 126 (1938). This Court has held that when the Board has required an employer to reinstate a discriminatorily discharged employee with full seniority and other rights, and with back pay for the period of his discharge, the employer's liability or responsibility to that employee is at an end. *Republic Steel Corp. vs. N. L. R. B.*, 311 U.S. 7, 85 L. Ed. 6 (1940).

In the *Republic Steel* case, which will be discussed further *infra*, this Court had for consideration a problem involving a back pay order of the Board. In discussing the authority of the Board with regard to back pay orders, the Court made the following observation:

> "The Act is essentially remedial. It does not carry a penal program declaring the described unfair labor practices to be crimes. The Act does not prescribe penalties or fines in vindication of public rights or provide indemnity against community losses as distinguished from the protection and compensation of employees. Had Congress been intent upon such a program, we cannot doubt that Congress would have expressed its intent and would itself have defined its retributive scheme."

We also call to the attention of the Court its decision in *Social Security Board vs. Nierotko*, 327 U.S. 358, 90 L. Ed. 718 (1946), in which the Court made the following observation regarding back pay awards of the National labor Relations Board:

"Under Section 10(c) of the Labor Act, the Labor Board acts for the public to vindicate the prohibitions of the Labor Act against unfair labor practices . . . and to protect the right of employees to self-organization which is declared by Section 9, 29 U.S.C.A. sec. 157, 9 F.C.A. title 29, section 157. It is also true that in requiring reparation to the employee through 'back pay' reparation is based upon the loss of wages which the employee has suffered from the employer's wrong. 'Back pay' is not a fine or penalty imposed upon the employer by the Board. Reinstatement and 'back pay' are for the 'protection of the employees in the redress of their grievances' to make them 'whole'. . . . "

II.

BY REQUIRING RESPONDENT COMPANY TO PAY TO ITS DISCHARGED EMPLOYEES A SUM OF MONEY EQUAL TO WHAT THEY WOULD HAVE EARNED DURING THE PERIOD OF THEIR DISCHARGE AND BY REFUSING TO PERMIT RESPONDENT COMPANY TO DEDUCT FROM THESE SUMS OF MONEY THE AMOUNTS OF MONEY WHICH THESE EMPLOYEES RECEIVED FROM THE LOUISIANA UNEMPLOYMENT COMPENSATION FUND DURING THE PERIOD OF THEIR DISCHARGE, THE BOARD IS MAKING THESE EMPLOYEES MORE THAN WHOLE.

As shown in Section I of this Argument, the purpose of the back pay award is to make an employee whole for his loss of wages during the period of his discharge. State Unemployment Compensation benefits are similarly intended to compensate an employee for lost

wages. Hence, to the extent that a back-pay claimant has received such Unemployment Compensation benefits, he has already been made partially whole. These benefits of the Unemployment Compensation Fund flow inevitably and directly from employment. The fund is financed exclusively by a tax on employers. An employee is entitled to these benefits from the fund by virtue of the fact that he had been employed and has presently lost his job and his wages.

We think it readily discernible that by refusing to permit Respondent to deduct from the amount due to its discharged employees a sum of money equal to that which those employees received from the State Unemployment Compensation Fund, the Board is making the employees concerned more than whole. Stated simply, the Board is telling Respondent that for the period of the discharge, Respondent must pay to its employees X dollars representing the loss of earnings of those employees; during the same period of unemployment, and **because of** the same period of unemployment, these employees have received Y dollars. Thus, these employees, under the Board's theory, would receive the sum of X plus Y dollars for a period in which they normally were entitled to only X dollars. Of course, these employees have performed no productive work whatsoever to receive either the X dollars or the Y dollars during this period.

Such a ruling by the Board will encourage idleness and the prolongation of labor disputes and is strongly contrary to public policy. If a back pay claimant actively seeks employment and finds a job, his interim earnings will be deducted from the back pay award; however, applying the rule of the Board, if he is idle

and draws Unemployment Compensation benefits then this is not deducted from the back pay award. **The result is that a back pay claimant makes more money by being idle than he would make either by working for his former employer or by working for another employer.** Such a result cannot be considered socially and economically acceptable.

The Board makes the interesting contention that its present rule which makes the employee whole for loss of wages, without consideration of the unemployment compensation benefits which he may have received, does **not** make the employee more than whole for the reason that the employee may have suffered some collateral losses during his period of unemployment. The Board states that since it does not consider collateral losses, it need not consider collateral benefits, such as "home relief, union relief, veterans' disability compensation or unemployment compensation funds." (See pp. 29-30 of Board's brief).

The short answer to this argument of the Board is that Respondent is not asking for a deduction from the back pay award because of home relief, union relief, or veteran's disability compensation benefits—which may truly be termed "collateral benefits". Respondent has raised in this case solely the question of unemployment compensation payments which are a **direct** benefit from the employer. The Board has anticipated Respondent's reply and makes the further argument that since the employee actually receives his unemployment compensation benefits from the state, it is a collateral benefit, not a direct one. But in advancing this argument, the Board has shut its eyes to the facts as that the Louisiana Unemployment Compensation Fund is a fund

built up solely by the employers of that state, b) that although the taxes paid by all employers are commingled, a separate account is kept for each employer showing the taxes paid in by it and the payments made out of the fund to its employees; c) that the employer's tax rate is affected by the benefits paid out of the fund to its employees, and d) that the purpose of the fund is to alleviate the effects of unemployment upon employees, regardless of whether the unemployment is caused by a shortage of work or an unfair labor practice. We submit most earnestly that these facts establish that unemployment compensation benefits are a **direct** benefit to employees—not collateral.

Actually, a discharged employee is treated with ample generosity and fairness under the Board's present rule regarding interim earnings. The Court will remember that in *Republic Steel Corp. vs. N. L. R. B.*, *supra*, it was held that the employer was entitled to deduct from a back pay award not only such sums of money as the employee had earned during his period of discharge, but also such sums of money which the employee had "wilfully refused to earn". As a result of this case, the Board established a rule that states that where an employee who has been discriminatorily discharged registers for employment with the United States Employment Service, or a similar state agency, it is **conclusively** presumed that the employee has made all reasonable efforts to obtain interim employment. *Ohio Public Service Co.*, 52 N.L.R.B. 725 (1943); *Harvest Queen Mill & Elevator Co.*, 90 N.L.R.B. No. 32 (1950). Although this ruling of the Board is not presently at issue in the instant case, it is mentioned here to show that while the Board speaks of the collateral losses which an employee may suffer during the period

of discharge, the Board itself nevertheless gives that employee the benefit of a **conclusive** presumption regarding back pay, which should be of great benefit to the employee. In fact, this rule of the Board might be considered a collateral gain by the employee, because it would seem obvious that mere registration with an employment service, without additional attempts to secure employment through other means, would not constitute a serious, *bona fide* effort to locate other employment.

III.

BY REFUSING TO PERMIT AN EMPLOYER TO DEDUCT FROM A BACK PAY AWARD SUCH AMOUNTS OF MONEY AS THE EMPLOYEES HAVE RECEIVED FROM THE LOUISIANA UNEMPLOYMENT COMPENSATION FUND, THE BOARD IS PLACING A DIRECT, UNWARRANTED PENALTY UPON THE EMPLOYER.

To appreciate fully this part of Respondent's argument, it is necessary that the Court have an understanding of the operations of the Louisiana Unemployment Compensation Act, particularly as regards the method of computing the tax upon employers. Commencing at page 63 of the brief filed herein by the Board, there are set forth certain pertinent portions of the Louisiana Unemployment Compensation Law. Since these portions of the Law are fully set forth in the brief of the Board, Respondent will not repeat them herein. It should be noted at the outset, as shown in the Statement of Public Policy of the Law, (see page 64 of the Board's brief) that the policy of the Louisiana Unemployment Compensation Law is to mitigate the menace to the health and welfare of the people of that

State arising from unemployment. To accomplish this purpose, the Act provides that employees who are unemployed, and who can meet certain requirements as set forth in the Act, are entitled to draw Unemployment Compensation benefits from a fund which is raised by a tax upon the employers within the State. The same act which sets forth the benefits to which unemployed workers are entitled also sets forth the method of raising the funds to provide these benefits. Thus in the stated policy of the Act, we find the following language:

> "The achievement of social security requires protection against this greatest hazard of our economic life [unemployment]. This can be provided by encouraging employers to provide more stable employment and **by the systematic accumulation of funds during periods of employment to provide benefits for periods of unemployment,** . . . " (Emphasis added.)

Commencing on page 68 of the Board's brief, there are found certain provisions of the Louisiana law which show the method of determining the rate of taxation to be paid by employers for the purpose of maintaining the Unemployment Compensation Fund. All employers within the State are required to pay a tax, called a "contribution" in the Law, which tax is a certain percentage of the employer's actual pay roll for each calendar quarter of the year. The rate of tax is fixed in the Act at 2.7 per centum, unless the employer can qualify for a reduced rate of taxation by virtue of having a favorable "experience-rating record". This experience-rating record is determined by the formula set forth in the Act. Basically, the formula for determining this experience-rating record is one which

considers the total amount of tax paid into the fund by an employer, the total amount of benefits paid out of the fund which are attributable to former employees of that same employer, and the size of the employer's average annual pay roll. Exactly, the formula works in the following fashion. From the total amount of tax paid into the fund by a given employer, there is deducted the total amount of benefits paid out of the fund, and charged to that employer's account—this remainder is entitled the "excess". This "excess" is then divided by the average of the employer's payroll over a period of three years, resulting in a certain quotient. This resulting quotient is then applied to the table set forth in the law, (see pages 69-70 of the Board's brief), and depending on the size of this quotient, the employer's rate of taxation may be reduced from 2.7 per centum down to 0,9 per centum, or to some percentage lying between these two rates.

Thus, the more benefits paid out of the fund and charged to a particular employer the smaller will be the excess of his contributions over his benefits charged. The smaller this excess is, the smaller the resulting quotient is, and then by applying the smaller quotient to the table, the higher is that particular employer's rate of taxation. It is particularly important to notice that by following this formula, a benefit paid out of the fund and charged to a particular employer becomes a permanent part of that employer's experience-rating record. It does not terminate after any given number of years. It may happen that in any given year a certain series of benefit charges will not be sufficient to change the employer's experience-rating record so as to require him to pay a higher rate of taxation than he normally would have; however, that particular series

of benefit charges remains a part of his record and will be a factor in the computation of his tax each and every year in the future. It is obvious, that although the particular benefit charges may not change the employer's tax in a given year, over a period of many years, there will inevitably come a time in which those benefit charges will make the difference between the employer having a higher or a lower rate of taxation for the ensuing year.

Applying the rules of the Louisiana Unemployment Compensation Law to the facts of the instant case, it can be seen that the benefit charges, made against the account of Respondent and resulting from such sums of money as the employees involved in this case have received as benefits from the Louisiana Unemployment Compensation Fund, have become a permanent part of Respondent's experience-rating record as kept by the Administrator of the Louisiana Fund. Whether these specific payments from the fund to the employees involved in this case have actually increased Respondent's rate of contribution or not, is a matter which, we submit, is not particularly relevant to our case. The fact is that these payments do become a part of Respondent's experience-rating record and do affect Respondent's rate of contribution for all future years. Whether these particular payments were sufficient to change Respondent's rate of taxation for any given year in the past, or will change Respondent's rate in any ensuing year, does not affect the merits of the case. The foregoing review of the method of operation of the law shows clearly that these payments **will** have a very substantial effect upon Respondent's rating record, and will affect that record to the detriment of Respondent, some time in the past, the present, or the future,—and will

have an effect upon that record in each and every ensuing year. Of course, when an increased rate of taxation of only a small percentage is applied to an annual payroll of some two hundred employees (R. 38), it can be seen that the resulting tax increase will be substantial. Although the record does not show what Respondent's annual payroll totals, it can be seen that even if all of the two hundred employees received only the Wage-Hour Law minimum of seventy-five cents per hour, the annual payroll would be in excess of three hundred thousand dollars.

We submit that a rule of the National Labor Relations Board which requires Respondent to obtain no credit, or deduction, from a back pay award, in an amount equal to that which the discharged employees have received from the Louisiana Unemployment Compensation Fund works a direct and unnecessary penalty upon Respondent. Not only does the employer, under the Board's rule, make these employees more than whole for any loss of wages which they suffered during the period of their unemployment, but the employer is also made subject to an increased rate of taxation under the Louisiana Unemployment Compensation Law.

In *Republic Steel Corporation vs. N. L. R. B.*, *supra*, this Court has stated the rule that the Labor Board is without authority to penalize or punish an employer for an unfair labor practice. The facts of that case were that the Board had ordered the Company to offer reinstatement to certain employees, and to make these employees whole for any loss of wages which the employees suffered during the period of their discharge. The Board's Order permitted the employer to deduct from the back-pay award such sums of money as the

employees had received from any state, federal, or county agencies growing out of "work relief projects". However, the Board's Order further required that the employer reimburse these state, federal and county agencies in such sums of money as the employer's discharged employees had received from these "work relief projects" during the period of their unemployment. This Court reversed the Order of the Board on the question of paying money back to the governmental agencies, for the reason that the Board's authority was limited to making the discharged employees whole, and the Board was not authorized to inflict penalties upon the employer.

After holding that the powers of the Labor Board were limited to making employees whole, this Court went on to say:

> "As the sole basis for the claim of authority to go further and to demand payments to governments, the Board relies on the language of § 10(c), 29 USCA § 160(c) which provides that if upon evidence the Board finds that the person against whom the complaint is lodged has engaged in an unfair labor practice, the Board shall issue an order—'requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act."
>
> * * * * *
>
> "To go further and to require the employer to pay to governments what they have paid to employees for services rendered to them is an exaction neither to make the employees whole nor to assure they can bargain collectively with the employer through representatives of their own

choice. We find no warrant in the policies of the Act for such an exaction."

In *Phelps Dodge Corp. vs. N. L. R. B.*, 313 U.S. 177, 85 L. Ed. 1271 (1941), this Court considered the question of whether there should be deducted from a back pay award ordered by the Board such sums of money which the employees "failed without excuse to earn" during the period of their discharge, the Board had refused to include such a deduction in its Order, but the Court of Appeals for the Second Circuit had amended the Board's Order so as to provide such a deduction. The Board then petitioned, and obtained a writ of certiorari from this Court to review that decision of the Court of Appeal. This Court held that to permit employees who were discharged to refuse wilfully to obtain other employment during their period of discharge was unwholesome. Accordingly, it affirmed the decision of the Court of Appeal. We submit the following language from the opinion of the Court as being pertinent:

> "As part of its remedial action against the unfair labor practices, the Board ordered that workers who had been denied employment be made whole for their loss of pay. In specific terms, the Board ordered payment to the men of a sum equal to what they normally would have earned from the date of the discrimination to the time of employment less their earnings during this period. The court below added a further deduction of amounts which the workers 'failed without excuse to earn,' and the Board here challenges this modification.
>
> "Making the workers whole for losses suffered on account of an unfair labor practice is part of the vindication of the public policy which the Board enforces. Since only actual losses

> should be made good, it seems fair that deductions should be made not only for actual earnings by the worker but also for losses which he willfully incurred."

It was on the reasoning of the *Republic Steel* case, quoted above, that the Court of Appeals for the Fifth Circuit modified the Order of the Board in this case to permit Respondent to deduct unemployment compensation benefits from the back pay award. Respondent submits that the analogy between that case and the instant case is very close, that in both cases the Board sought not only to make the employees whole, but also to inflict an unwarranted penalty on the employer,—and that the Board is without authority to impose penalties in the form of punitive awards of back pay.

CONCLUSION

Respondent submits that the issue in this case is very simple and easy of decision. Respondent's arguments can be summed up shortly in this fashion:

To require an employer to make whole an employee who has been discriminatorily discharged by paying the employee wages for work not performed may be said to be an indirect, and justified, penalty against the employer for an unlawful act. We have no quarrel with this proposition. But when the National Labor Relations Board, by its Order, makes an employee more than whole, and in doing so subjects an employer to a probable higher rate of taxation under a state unemployment compensation law, we submit that the Board has placed a directly penalty upon that employer—a penalty which is not only unjustified in principle, but one which is beyond the scope of the law.

For the reasons stated heretofore, it is respectfully submitted that the judgment of the Court of Appeals for the Fifth Circuit should be affirmed.

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New Orleans, Louisiana
November, 1950.